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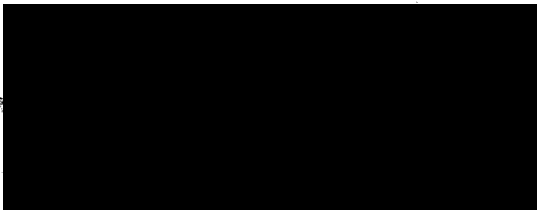
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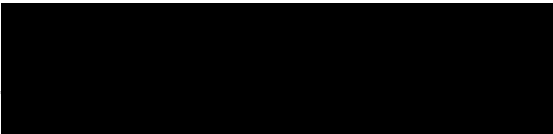
U.S. Citizenship
and Immigration
Services

34



FILE: EAC-02-176-52010 Office: VERMONT SERVICE CENTER Date: SEP 23 2004

IN RE: Petitioner:
Beneficiary



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

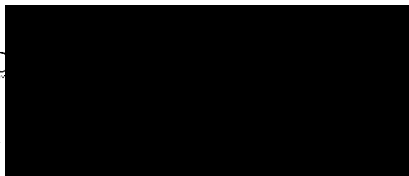
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office



DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits a letter and evidence previously submitted into the record of proceeding.¹

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 13, 2001. The proffered wage as stated on the Form ETA 750 is \$11.73 per hour, which amounts to \$24,398.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1999, to currently employ five workers, but did not list its gross annual income. In support of the petition, the petitioner submitted copies of its Form 1120 U.S. Corporation Income Tax Return for the years 2000 and 2001.

The tax returns reflect the following information for the following years:

2001

2000²

¹ The petitioner apparently filed the appeal without the assistance of counsel. However, since the petitioner's owner, who submitted a letter on appeal, did not explicitly state that the petitioner is no longer represented by counsel, a copy of this decision is being sent to the attorney for whom a properly executed Form G-28, Notice of Entry of Appearance of Attorney or Representative, remains in the record of proceeding.

² The petitioner's financial situation in the year 2000 is not necessarily dispositive to its continuing ability to pay the proffered wage from the date of the priority date, which is 2001.

Net income ³	-\$13,454	-\$21,718
Current Assets	\$9,063	\$4,363
Current Liabilities	\$2,945	\$3,358
Net current assets	\$6,118	\$1,005

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 5, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director noted the deficient numbers represented in the petitioner's tax returns and specifically requested copies of Form W-2, Wage and Tax Statements, or other evidence of wages already paid to the beneficiary, as well as annual reports accompanied by audited financial statements.

In response, the petitioner submitted a letter from the petitioner's certified public accountant (CPA), dated November 27, 2002, which states that the petitioner's owner [REDACTED] "has cash and marketable securities worth \$97,102, which he can use to support the cash flow of [the petitioner]. He also has fixed assets worth \$49,000 and no liabilities." The petitioner also submitted [REDACTED] checking account statements for the period July 24, 2002 through August 22, 2002, October 1, 2002 through October 31, 2002.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 9, 2003, denied the petition.

On appeal, [REDACTED] submits a letter, dated May 7, 2003, stating that the petitioner "has purchased the building it operates from [REDACTED] also states, in pertinent part, the following:

The income will increase by \$13,200 per year. Mortgage and Taxes equal \$3,900.00 per month, rental income \$5,000 per month. The business will be expanding its hours opening a seventh day which averages to an extra \$45,000 per year. All of these increases in income will suffice the \$24,398 wages for [the beneficiary].

All my investments, assets, cash in bank, purchase of properties are all products of the income generated from my business [the petitioner]. Therefore, wages of \$24,398 for [the beneficiary] would not have been a problem.

[REDACTED] resubmits evidence previously submitted into the record of proceeding.

At the outset, counsel's and the petitioner's reliance on the assets of Mr. Debany is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept.

³ Taxable income before net operating loss deduction and special deductions on Line 28.

18, 2003). Thus, [REDACTED] "investments, assets, cash in bank, purchase of properties" will not be considered with respect to the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary any wages in 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The petitioner's net income in 2001 was -\$13,454, from which it would be impossible to pay a proffered wage of \$24,398.40. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage out of its net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner's net current assets during the year in question, 2001, however, were only \$6,118, which is much less than the proffered wage of \$24,398.40. As such, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of -\$13,454 and net current assets of only \$6,118 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner urges the AAO to consider its real estate property's value. However, the petitioner presented no evidence to corroborate its assertion. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Real estate is not typically a tangible current asset used to pay employees' salaries. Additionally, even if the petitioner meant to use rental income to increase its earnings and ability to pay wages, apparently this acquisition was recent and offered as prospective evidence, and does not illustrate the petitioner's ability to pay the proffered wage as of the priority date, which in this case, is in 2001. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.